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OFFICE OF PETITIONS

In re Application of :
Michael Stroble, et al. :
Application No. 09/801,908 : ON PETITION
Filed: March 9, 2001 :
Attorney Docket No. 833970.0002 :

This is a decision on the petition under 37 CFR 1.137(a), filed January 7, 2004, to revive the above-identified application.

The petition is **DISMISSED.**

Any further petition to revive must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137." This is **not** a final agency action within the meaning of 5 U.S.C.§ 704.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed;[1] (2) the petition fee as set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c). The instant petition lacks item (3).

A Notice of Non-Compliance (Notice) was mailed to applicant on May 16, 2003 setting a one-month within which to submit a reply. Since no reply was received and no extensions of time under the provisions of 37 CFR 1.136 were obtained, the application became abandoned on June 17, 2003.

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[1] In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

Petitioner asserts in the instant petition that the Notice was not received and that a change of address and Power of Attorney were filed on June 18, 2003, which was ultimately accepted by the USPTO on July 24, 2003. Petitioner further states a Status Inquiry was filed on July 31, 2003. A review of the file record discloses that a change of address was filed on May 27, 2003. The file record also confirms receipt of the Power of Attorney filed June 18, 2003 and the Notice of Acceptance of the Power of Attorney mailed on July 24, 2003. However, there is no record of the Status Inquiry which petitioner states was filed on July 31, 2003. Absent a certificate of mailing under 37 CFR 1.8 or postcard receipt, it cannot be concluded whether the Status Inquiry was actually filed with the USPTO.

The showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 35 U.S.C. § 151 and 37 CFR 1.137(a).

Petitioner has not provided a copy of the docket record from the firm to which the Office action was sent, nor has petitioner provided a copy of the docket record from the new firm. In view thereof, the showing of record does not establish that the delay in this case was unavoidable. MPEP 711.03(c) in pertinent part states:

> "The showing required to establish nonreceipt of an Office communication must include a statement from the petitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. For example, if a three month period for reply was set in the nonreceived Office action, a copy of the docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action."

In view of the above, petitioner should provide a copy of the docket records where the Office action would have been recorded had it been received.

Petitioner may want to consider filing a petition stating that the delay was unintentional. Public Law 97-247, § 3, 96 Stat. 317 (1982), which revised patent and trademark fees, amended 35 U.S.C. § 41(a)(7) to provide for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of the issue fee was "unavoidable." This amendment to 35 U.S.C. § 41(a)(7) has been implemented in 37 CFR 1.137(b). An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the $665 petition fee.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By Mail: Mail Stop PETITION
Commissioner for Patents
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Telephone inquiries concerning this decision should be directed to the undersigned at (703) 306-3475.

Marianne E. Morgan
Petitions Examiner
Office of Petitions
Office of the Deputy Commissioner
for Examination Policy